



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAY 29 2009

Scott Thomas, Esq.
Dickstein Shapiro LLP
1825 Eye Street, NW
Washington, DC 20006-5403

RE: MUR 6023
3eDC, LLC

Dear Mr. Thomas:

On June 16, 2008, the Federal Election Commission ("the Commission") notified your client, 3eDC, LLC, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 19, 2009, the Commission found, on the basis of the information in the complaint and information provided by your client, that there is no reason to believe that 3eDC, LLC violated 2 U.S.C. §§ 441a or 441b. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Ana Peña-Wallace, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg".

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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4 **RESPONDENT: 3eDC, LLC**

MUR: 6023

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6 **I. INTRODUCTION**

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8 This matter is based upon a complaint filed with the Federal Election Commission ("the
9 Commission") by David Donnelly, *see* 2 U.S.C. § 437g(a)(1), alleging that 3eDC, LLC
10 ("3eDC"), an Internet consulting company partly owned by Rick Davis, John McCain's
11 campaign manager, made a prohibited corporate contribution to John McCain 2008, Inc. and
12 Joseph Schmuckler, in his official capacity as treasurer, ("McCain Committee") when it reduced
13 the campaign's debt to 3eDC by over \$100,000.

14 Based upon the available information, including a written response from the respondent
15 denying the allegations, there is no information to indicate that 3eDC may have committed the
16 violation alleged in the complaint. Accordingly, the Commission finds no reason to believe that
17 3eDC violated the Federal Election Campaign Act of 1971, as amended ("the Act"), in
18 connection with the allegations in this matter.

19 **II. FACTUAL AND LEGAL ANALYSIS**

20 **A. Factual Background**

21 The McCain campaign hired 3eDC to develop and maintain the campaign's website.
22 3eDC Response to Complaint ("3eDC Response") at 1. 3eDC provided those services, which
23 included website development, e-mail list building, social networking tools, and database
24 management from January through May 2007. *Id.* at 2-4. The complaint alleges that 3eDC
25 reduced its bill for Web services provided to the McCain campaign by \$107,475 at a time when

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1 the campaign was struggling financially and attempting to cut costs, resulting in a prohibited
2 corporate contribution under 2 U.S.C. § 441b and 11 C.F.R. § 100.55. The complaint refers to
3 public statements by the McCain campaign that there were billing errors and that the bill was
4 renegotiated. However, the complaint questions how “a campaign manager can renegotiate a
5 contract with a firm that he partly owns without at least the appearance that he has used his
6 influence with both parties to reduce the debt.” Complaint at 6.

7 A number of press articles report that Rick Davis arranged for the campaign's initial
8 service contract with the vendor, 3eDC, and that the contract with 3eDC “initially brought
9 objections from top [McCain] advisers,” with some individuals accusing Davis of “self-dealing.”
10 Michael Cooper, *Savior or Machiavelli - McCain's Top Aide Carries On*, N.Y. TIMES, Oct. 23,
11 2007, at A26; Matthew Mosk, *Top McCain Adviser has Found Success Mixing Money, Politics*,
12 WASHINGTON POST, June 26, 2008, at A01. However, 3eDC claims that Davis was not involved
13 in negotiating the initial contract or in any other discussions concerning 3eDC. See 3eDC
14 Response at 2 and Attachment 1. Information obtained by the Commission indicates that Davis
15 was “only a passive investor in 3eDC,” was not involved in its day-to-day operations, and that he
16 recused himself from any involvement with 3eDC while working for the McCain campaign.
17 There is conflicting publicly available information, however, on whether Davis disclosed his
18 financial interest in 3eDC to McCain early in the campaign. Cooper, *supra* at A26; Edward T.
19 Pound, *Troublesome Resumes*, U.S. NEWS & WORLD REPORT, May 28, 2007, at 50.

20 3eDC's response explains that the parties had a legitimate dispute regarding the amount
21 the campaign owed to 3eDC. 3eDC and the McCain campaign entered into a contract for
22 services on January 26, 2007. 3eDC Response at 2-3 and Attachment 2 (Services and Licenses
23 Agreement). The contract details 3eDC's fee structure for its services to the McCain Committee,

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1 including base fees, hourly rates for additional work, and administrative fees. 3eDC Response at
2 2-3 and Attachment 2, at 24. In May 2007, 3eDC decided to invoke the contract's termination
3 clause because the campaign had failed to pay two outstanding invoices when they were due,
4 which 3eDC considered to be a material breach of the agreement. 3eDC at 3 and Attachment 2,
5 ¶ 9.2. Initially, 3eDC sent a letter, dated May 11, 2007, to the McCain Committee requesting
6 that it pay \$164,138.21, the total owed on those invoices, in order to cure the material breach.
7 *Id.* at Attachment 3. The parties discussed the matter and decided to terminate the service
8 agreement. *Id.* at 3. They entered into a Termination Agreement and Release ("Termination
9 Agreement"), dated May 18, 2007, that required payment of the overdue invoices totaling
10 \$164,138.21, required 3eDC to deliver a Final Statement of unpaid services to the campaign by
11 May 25, 2007, included a provision providing for accrual of 1% interest per month for amounts
12 that were past due, and required the campaign to make full payment, plus interest, within 60 days
13 of receipt of the Final Statement. 3eDC Response at 3 and Attachment 4. The Termination
14 Agreement estimated that the remaining invoices to be included in the Final Statement totaled
15 approximately \$725,000. *Id.* at Attachment 4, ¶ 1(b). The McCain campaign paid \$164,138.21
16 upon execution of the agreement on May 18, 2007.

17 According to information obtained by the Commission, 3eDC never delivered a "Final
18 Statement" to the campaign, but instead "revised and confirmed the existing pending invoices."
19 Nevertheless, before the sixty-day deadline, the McCain Committee sent a letter dated July 16,
20 2007, invoking an "audit" provision from the Services and License Agreement that allowed the
21 campaign to conduct a review and analysis of the vendor's records supporting the fees and
22 expenses invoiced by 3eDC. 3eDC Response at 4, Attachment 2, ¶ 3.6 and Attachment 3. The
23 Commission's information indicates that the McCain Committee also began its review in

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1 response to news reports alleging that Rick Davis personally benefitted from the committee's
2 contract with 3eDC.

3 Upon completing its review, the McCain Committee submitted a seven-page summary to
4 3eDC, dated September 10, 2007, that proposed adjustments for fees that it believed were in
5 error or where it believed there was insufficient documentation to support the expenses, and
6 proposed to pay a total of \$585,001.83 to settle the debt. 3eDC Response at Attachment 6. The
7 McCain Committee's summary provides a detailed account of the disputed invoice amounts. *Id.*
8 Specifically, the Committee proposed a reduction in 3eDC's hosting charges by \$22,022.42; in
9 Internet advertising by \$42,341.34; and website content and development by \$63,119.24.
10 During the course of its review, the campaign also identified adjustments in 3eDC's favor, which
11 it credited to 3eDC. In total, the McCain Committee proposed a reduction of approximately
12 \$127,483.

13 According to Chief Executive Officer Scott Wilkinson, while 3eDC did not agree with all
14 of the adjustments, it believed that the proposal was commercially reasonable and agreed to
15 accept the committee's proposal, subject to some additional terms. 3eDC at 4 and Attachment 7.
16 Those terms included required interest payments of 6% a year, monthly installments, a payment
17 schedule, late fees of 1% per month, an acceleration clause if the campaign ceased operating
18 before December 1, 2008, and required that the McCain Committee not seek reimbursement for
19 the cost of its audit. 3eDC Response at 5 and Attachment 7. 3eDC believed that accepting the
20 campaign's proposal, along with the additional terms, was commercially reasonable and the best
21 course of action to "resolve the matter in order to get paid." *Id.* at 4. 3eDC explained that it
22 balanced the costs of potential litigation, which would also result in more time passing without
23 receiving payments from the campaign, compared with the "relatively small amount involved."

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Id. at 5. Based on those considerations, settling the matter at the reduced amount proposed made the most “financial sense.” *Id.* Ultimately in September 2007, both parties agreed to these terms, which required 15 monthly payments that would end on December 25, 2008. 3eDC Response at Attachment 7. According to information obtained by the Commission, all required monthly payments were made to 3eDC pursuant to the parties’ negotiated resolution, and the full amount was paid several months early.

B. Legal Analysis

The Act prohibits corporations from making contributions in connection with federal elections. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b)(1). As a limited liability company, 3eDC may be subject to the prohibition against corporate contributions, depending on whether it elects to be treated as a partnership or corporation by the Internal Revenue Service. 11 C.F.R. § 110.1(g). If treated as a partnership, it is possible that 3eDC made an excessive in-kind contribution to the McCain Committee in violation of 2 U.S.C. § 441a when it reduced the committee’s debt as that reduction was well in excess of the maximum contribution of \$2,300 per partner as allowed by law. 11 C.F.R. § 110.1(e). If 3eDC elected tax treatment as a corporation, it may have made a corporate contribution in violation of 2 U.S.C. § 441b(a) if its agreement with the McCain Committee was not commercially reasonable. Information regarding 3eDC’s tax election is not publicly available. Therefore, it is unclear whether 3eDC is subject to the prohibition against corporate contributions or the contribution limits applicable to partnerships. 11 C.F.R. § 110.1(g). Nonetheless, it is not necessary to investigate 3eDC’s tax status because the Commission concludes that the agreement was commercially reasonable. Thus, there is no reason to believe there is a violation of either section 441a or 441b, as explained below.

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1 The allegations in the complaint raise the question whether 3eDC's reduction of its bill of
2 services to the McCain Committee by \$127,483 was commercially reasonable. Commission
3 regulations provide that a commercial vendor may forgive or settle a debt for less than the full
4 amount owed or may resolve a disputed debt, if it has treated the debt in a commercially
5 reasonable manner and complied with the regulatory requirements in 11 C.F.R. §§ 116.4 and
6 116.10. "Commercial vendor" is defined as "any persons providing goods or services to a
7 candidate or political committee whose usual and normal business involves the sale, rental, lease,
8 or provision of those services." 11 C.F.R. § 116.1(c). For unincorporated vendors, such as
9 3eDC, the amount forgiven is not considered a contribution if the commercial vendor has treated
10 the debt in a commercially reasonable manner and satisfied the relevant requirements of
11 11 C.F.R. § 116.7 or 116.8. *Id.* at § 116.4(a). A vendor can demonstrate that it has treated a debt
12 in a commercially reasonable manner by showing that: (1) the original extension of credit was
13 proper pursuant to 11 C.F.R. § 116.3; (2) the committee has undertaken all reasonable efforts to
14 satisfy the outstanding debt, such as engaging in additional fundraising, reducing overhead and
15 administrative costs, or liquidating assets; and (3) that the vendor has pursued its remedies as
16 vigorously as it would pursue its remedies against a similarly situated non-political debtor, *i.e.*,
17 that it has made oral and written requests for payment, withheld delivery of goods or services
18 until overdue debts are satisfied, imposed additional charges for late payment, referred the debt
19 to a collection service, or litigated for payment on the debt. 11 C.F.R. § 116.4(d).

20 Ongoing committees may resolve disputed debts, but the parties must nevertheless treat a
21 disputed debt in a "commercially reasonable manner" in accordance with 11 C.F.R. § 116.4(a)
22 and (d). A disputed debt, defined as an actual or potential debt or obligation where there is a
23 *bona fide* disagreement between the creditor and the political committee as to the existence of

1 the debt or the amount owed, is not subject to the debt settlement requirements and procedures
2 set forth in 11 C.F.R. §§ 116.7 and 116.8. *See* 11 C.F.R. §§ 116.1(d) and 116.7(c)(2).

3 Commission regulations also state that a commercial vendor may extend credit to a
4 candidate or political committee, provided that the extension of credit is in the ordinary course of
5 the vendor's business practices and that the terms of the credit are substantially similar to
6 extensions of credit to non-political entities, and they further provide that an extension of credit
7 includes agreements between a vendor and political committee providing additional time to pay
8 an amount due or the failure of the committee to make full payment by the previously agreed
9 upon due date. 11 C.F.R. §§ 116.1(e) and 116.3(a).

10 Here, the complaint questions the circumstances surrounding the negotiation of the debt
11 the McCain Committee owed to 3eDC. Both 3eDC and the McCain Committee indicate that
12 they had a *bona fide* dispute regarding the amount that the campaign owed and add that the
13 reduction that was ultimately negotiated was commercially reasonable. As discussed below,
14 there is no information to contradict those contentions.

15 First, there is no information to indicate that the original service contract between 3eDC
16 and the campaign, or that their negotiations concerning the amount owed by the campaign, was
17 not proper pursuant 11 C.F.R. § 116.3(c). *See* 11 C.F.R. § 116.4(d)(1). The complaint provides
18 no information to demonstrate that 3eDC deviated from its established procedures and
19 past practices in any of its arrangements with the campaign. *Id.* at § 116.3(c)(1). While 3eDC
20 has not provided specific information to demonstrate that its actions in re-negotiating the fees
21 with the Committee followed the company's established procedures, whether the transaction
22 "conformed to the usual and normal practice in the commercial vendor's trade or industry," or if
23 it was on the same terms as those provided to non-political clients, as required by 11 C.F.R.

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1 § 116.3(c)(1)-(3), 3eDC has provided the Commission with substantial documentation to show
2 that they negotiated a reasonable resolution of a commercial dispute. As part of 3eDC's
3 response to the complaint, it provided thorough documentation regarding the initial service
4 contract, correspondence with each other concerning termination of the contract and negotiation
5 of the debt, and included sworn affidavits from representatives describing the circumstances
6 behind the negotiations. In addition, the Commission obtained lengthy documentation
7 containing the results of the McCain Committee's line item review of its account with 3eDC.
8 See 3eDC Response at Attachment 6 (providing Committee's seven-page summary sent to
9 3eDC). Further, the documentation demonstrates that the parties followed procedures
10 established in those agreements in order to terminate the contract, review invoices, and resolve
11 disputed amounts due.

12 Second, the McCain Committee's efforts to satisfy the outstanding debt were reasonable.
13 See 11 C.F.R. § 116.4(d)(2). As part of its efforts to resolve the outstanding debt, the McCain
14 Committee invoked the "Audit" provision from the Services and License Agreement, before the
15 sixty-day deadline for payment of the final invoices totaling approximately \$725,000, and
16 completed a review of 3eDC's records pertaining to the Committee's account that led to the
17 eventual reduction of the 3eDC's bill to the Committee. Although section 116.4(d)(2) lists other
18 efforts that can indicate reasonableness, such as engaging in further fundraising efforts, the
19 regulation states that the examples shown in the regulations are not an exhaustive list. In this
20 matter, the Committee's prompt and thorough review of 3eDC's records suggests that the
21 McCain Committee took reasonable steps to ascertain the correct amount due to the vendor and
22 then paid the amount ahead of schedule. The Committee's actions in accepting the additional
23 terms proposed by 3eDC to settle the debt also support this conclusion.

1 Although section 116.4(d)(2) requires that a committee undertake all reasonable efforts to
2 satisfy the outstanding debt, the McCain Committee did not admit that anything more than
3 \$585,001.83 was due on the contract, and it paid that amount. 3eDC may not have initially
4 agreed with that figure, but it accepted the results of the McCain Committee's audit. Thus, the
5 requirement that the McCain Committee use "all" reasonable efforts is satisfied in this case.

6 Finally, the information available supports a finding that 3eDC pursued its remedies as
7 vigorously as it would pursue its remedies against a nonpolitical debtor in similar circumstances.
8 11 C.F.R. § 116.4(d)(3). In response to the McCain Committee's failure to pay two invoices,
9 3eDC sought to terminate the service contract and sent a written request for payment. *Id.* at
10 § 116.4(d)(3)(i). In addition, upon receipt of the McCain Committee's written summary
11 proposing adjustments to 3eDC's fees, 3eDC proposed additional terms including interest
12 payments, a payment schedule and late fees. *Id.* at § 116.4(d)(3)(iii). While 3eDC chose not to
13 pursue litigation or refer the McCain Committee's debt to a debt collection service as suggested
14 in the non-exhaustive list found in the Commission's regulations, 3eDC explained that the cost
15 of litigation was one of its considerations in deciding to settle the matter for the amount proposed
16 by the campaign. 11 C.F.R. § 116.4(d)(3)(iv) and (v). 3eDC's business decision to settle the
17 Committee's debt for the bulk of the amount owed, plus interest payments and late fees, rather
18 than spend additional funds in hopes of obtaining an amount closer to \$725,000, does not appear
19 unreasonable.

20 Thus, the available documentation lends support to the contention that the reduction of
21 the McCain Committee's bill was done in a commercially reasonable manner. As discussed
22 above, the documentation also accounts for the time that passed between the termination of the
23 service contract and the campaign's payment of the amount owed to 3eDC. In past cases in

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1 which the Commission determined that in-kind contributions resulted, the cases involved long
2 delays in payment that did not appear commercially reasonable. *See* MUR 5396 (Bauer for
3 President 2000) (respondents entered into conciliation agreement to resolve, *inter alia*, 441a and
4 441b violations resulting from extensions of credit from three different vendors totaling over
5 \$700,000 and owed for periods between 105 to 235 days); MUR 5047 (Clinton/Gore '96) (the
6 Commission found reason to believe that the committee and two of its vendors violated section
7 441b by accepting or making illegal corporate extensions of credit totaling over \$900,000 that
8 were unresolved for four months or longer, but took no further action because the debts had been
9 paid in full and some debt collection activity had occurred).

10 In this matter, the parties negotiated a termination agreement within 7 days of 3eDC's
11 notification of the campaign's material breach of the contract. The Committee's audit of 3eDC's
12 records then lasted almost two months, from July to September 2007. However, upon
13 completion of the audit, the campaign sent a detailed summary to 3eDC proposing adjustments
14 in the invoices, and within a few days, the parties negotiated a final agreement for payment of
15 the remaining amount due to 3eDC, that included a payment schedule, interest payments and late
16 fees. The campaign immediately started the required payments in October 2007 and paid the
17 debt off early.

18 Accordingly, the Commission finds no reason to believe that 3eDC, LLC violated
19 2 U.S.C. §§ 441a or 441b.

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